AdvanceMe Inc v. RapidPay LLC Doc. 245

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ADVANCEME, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CAUSE NO. 6:05-CV-424 LED JDL**
RAPIDPAY, LLC, BUSINESS CAPITAL	§	
CORPORATION, FIRST FUNDS LLC,	§	
MERCHANT MONEY TREE, INC.,	§	
REACH FINANCIAL, LLC and	§	
FAST TRANSACT, INC. d/b/a	§	
SIMPLE CASH	§	
	§	
Defendants.	§	

DEFENDANTS' SUR-REPLY TO PLAINTIFF'S OBJECTIONS TO DEFENDANTS' EVIDENCE AND ARGUMENTS IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT OF PATENT INVALIDITY

In Defendants' Response to Plaintiff's Objections to Evidence and Argument in Defendants' Motion for Partial Summary Judgment of Invalidity, filed April 13, 2007 ("Plaintiff's Objections" and "Defendants' Response to Objections"), Defendants explained why Plaintiff's objections are frivolous. Rather than attempting to address Defendants' responses, Plaintiff abandoned the majority of its objections and replied with respect to only three. (Document No. 239, "Plaintiff's Reply in Support of Objections.") These three objections continue to lack merit and should be overruled.

35 U.S.C. § 102(g)

Plaintiff's timeliness objection regarding Defendants' Third Amended Invalidity Contentions exposes Plaintiff's desperate attempt to somehow avoid summary judgment of patent invalidity. Plaintiff, in footnote 1 of its Reply in Support of Objections, argues that "Defendants' Third Amended Invalidity Contentions were served on February 12, 2007 via

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email at 5:39 Pacific Time, i.e., 7:39 p.m. Central Time," and were thus not timely served. However, Plaintiff's statement appears to purposefully mislead the Court. As Plaintiff is aware, Defendants served their Third Amended Invalidity Contentions on February 12, 2007, via electronic mail and U.S. mail, as stated in the certificate of service. *See* Defendants' Response to Objections at 3; Ex. B to Defendants' Response to Objections at Certificate of Service. Also as Plaintiff is aware, Fed. R. Civ. P. 5(b)(2) states that "[s]ervice by mail is complete on mailing." Defendants' Third Amended Invalidity Contentions were thus timely served when Defendants mailed them on February 12.

As explained in Defendants' Response to Objections, Defendants' assertion of invalidity under Section 102(g) does not and cannot possibly prejudice Plaintiff. Indeed, Plaintiff had a full opportunity to examine all third party witnesses regarding the documents and testimony upon which Defendants rely to support their invalidity arguments under Sections 102(a), (b), and (g). Thus, in Plaintiff's Objections and its Reply in Support of Objections, Plaintiff merely asserts prejudice without explanation and cites cases that address invalidity contention amendments in inapposite circumstances (as explained in Defendants' Response to Objections at 5-6).

Plaintiff's only substantive objection to Defendants' compliance with P.R. 3-3 is that Section 102(g) is not independently labeled in Defendants' Third Amended Invalidity Contentions. Plaintiff exalts form over substance, however, as the Court will see that Defendants specifically identified Tim Litle, Randy Bourne, and/or Larry Bouchard and described the circumstances surrounding their invention. *See* Ex. B to Defendants' Response to Objections at 8. As a result, Plaintiff cannot genuinely argue that it was not on notice that Defendants intended to assert all applicable sections of 35 U.S.C. § 102 based on the Litle & Co. prior art.

Hanover Finance

With respect to Hanover Finance, Plaintiff continues to argue over semantics.[1] Whether Defendants defined merchants' repayment of obligations to third party creditors using the Litle & Co. method and system as the "Hanover Finance Program" or instead referred to it as "merchants' repayment of obligations owed to third party creditors" is irrelevant. The fact is, as Plaintiff admits, that Defendants disclosed merchants' repayment of obligations owed to third party creditors (e.g., Hanover Finance) in the Litle & Co. invalidity claim chart attached to Defendants' Second Amended Preliminary Invalidity Contentions, served August 30, 2006. *See* Plaintiff's Objections at 5.

As Tim Litle, the founder of Litle & Co., testified during his deposition on September 6, 2006, merchants utilized the Litle & Co. system and method to repay **six** different obligations—only two of which are included in Defendants' Motion for Partial Summary Judgment of Patent Invalidity (Document No. 215) ("Defendants' Motion") (postage advance repayment obligations ("Postage Advance Program") and third party creditor obligations ("Hanover Finance Program")). Defendants requested leave to amend their invalidity contentions to include the four additional obligations about which Mr. Litle testified on November 2, 2006, which the Court granted on December 4, 2006. *See* Document No. 141, Defendants' Motion for Leave to Amend Invalidity Contentions, at 3; Ex. B thereto at 2. All six obligations have thus been a part of Defendants' invalidity contentions since December 4, 2006—although Defendants' Motion is directed only at the two that were disclosed and asserted in their Second Amended Preliminary Invalidity Contentions, served August 30, 2006.

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[1] In its briefing on Defendants' Motion for Partial Summary Judgment, Plaintiff objects to the defined term "Litle Processing Entity." Whether Defendants define a term for ease of reference (e.g., "Litle Processing Entity"), or repeatedly refer to the combination of entities comprising the computerized merchant processor in the Litle & Co. prior art as "the combination of Litle & Co., NPC, and FNBL" is irrelevant in determining whether the claims of the '281 patent are invalid in light of the Litle & Co. prior art.

While Plaintiff attempts to characterize the Hanover Finance Program as a "separate allegedly anticipating reference," such a characterization misunderstands that the anticipating reference is the Litle & Co. system and method. The six obligations that were repaid using the Litle & Co. system and method do not constitute six separate references; instead, they are six separate ways that the single Litle & Co. reference anticipates all claims of the '281 patent.

Authentication

In addition to the testimony attached to Defendants' Motion, Defendants attached third party witness testimony to their Response to Objections[2] that authenticates the exhibits attached to Defendants' Motion—yet Plaintiff inexplicably continues to argue that they have not been authenticated. Plaintiff does not argue that any of Exhibits B-X have been altered in any way or that the document is not what it is claimed to be. Such arguments would be disingenuous, as counsel for Plaintiff attended and/or questioned deponents for countless hours over these same exhibits. Plaintiff's authentication argument is simply a red herring—a red herring without merit.

As a single example of the frivolousness of Plaintiff's authentication argument, Plaintiff argues that Exhibit C was not properly authenticated. *See* Plaintiff's Reply in Support of Objections at 5. But Plaintiff fails to acknowledge, despite the fact that it was specifically cited in Defendants' Response to Objections, that Allen Abbott authenticated his own signature and testified from personal knowledge as to Exhibit C's contents, thus authenticating Exhibit C. *See* Defendants' Response to Objections at 8. Again, it is apparent that Plaintiff will argue anything, regardless of whether the argument has any merit, to divert the Court's attention from the pertinent issues in Defendants' Motion.

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[2] As explained in Defendants' Response to Objections, the majority of the testimony attached to Defendants' Response to Objections was also attached to Defendants' Motion.

As explained in Defendants' Response to Objections, Defendants do not believe it is necessary to burden the Court with countering each of Plaintiff's transparent attempts at misdirection. To the extent the Court wishes to entertain any of Plaintiff's objections, Defendants will be prepared to explain the evidence or offer further evidence of authentication at the hearing on Defendants' Motion.

Conclusion

For the reasons set forth in Defendants' Response to Objections and herein, each of Plaintiff's objections should be overruled.

April 26, 2007

Respectfully submitted,

By: /s/ Joseph D. Gray

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all counsel of record who have consented to electronic service are being served a copy of this document via the court's CM/ECF system per Local Rule CV-5(a)(3) on this the 26th day of April, 2007. Any other counsel of record will be served by first class mail on this same date.

/s/ Joseph D. Gray
Joseph D. Gray